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No. 89-1120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELENOR M. CATALINA
Petitioner,

v.

CITY OF COLUMBUS, OHIO, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Sixth Circuit's decision, that the trial court properly cured an initial inconsistency between the jury's general verdict and its responses to special interrogatories, conflict with decisions from other federal courts of appeal; sanction a departure from the accepted usual course of judicial proceedings; or decide a federal question in conflict with applicable decisions of this Court?

II. Did the trial court disregard specific findings of the jury and substitute its own judgment regarding Title VII issues in conflict with decisions from other circuit courts of appeal, or in conflict with applicable decisions of this Court?

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JURISDICTION

This Court has jurisdiction to review the final judgment of the Sixth Circuit Court of Appeals under 28 U.S.C. §1254.

STATEMENT OF THE CASE

Petitioner, Elenor M. Catalina, filed her complaint in United States District Court for the Southern District of Ohio, Eastern Division, claiming that she was unlawfully terminated from her employment with the City of Columbus on September 29, 1978, and otherwise discriminated against on the bases of her sex, race and age. She sought remedies pursuant to the Civil Rights Act of 1866, 42 U.S.C. § 1981, Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000(e), the Age Discrimination in Employment Act, 29 U.S.C. § 621-634, the Equal Pay Act, 29 U.S.C. § 206(d), and the State and Local Fiscal Assistance Act, 31 U.S.C. § 6716(b).

Petitioner withdrew her claims under the Equal Pay Act and the State and Local Fiscal Assistance Act prior to trial.

Trial commenced on October 17, 1988. Petitioner's claims under 42 U.S.C. § 1981 and the Age Discrimination in Employment Act were tried to the jury. Petitioner's Title VII claims were tried to the court. The trial court sought an advisory verdict on the issue of sex discrimination from the jury.

The verdict form, the jury's completion of the same, and the trial court's action in response are all central to an understanding of what occurred in this case. The Respondents' proposed verdict form and drafts of the trial court's verdict form all contained instructions for each of the jury interrogatories indicating whether succeeding interrogatories were to be answered by the jury. In all drafts, the question as to whether Respondents' decision not to promote, or to discharge Petitioner were motivated by her race, was followed by an instruction indicating that if the answer was "no", the jury was to ignore the question whether the discrimination was done knowingly, intelligently and deliberately. The structure of the form was

approved by all counsel.

The final verdict form was prepared by the trial court. The court's clerk removed the instructions between the questions without the approval of the parties or the court.

The jury returned the verdict form making findings for Respondents on the general verdicts regarding the issues of race and age. The jury also found for Respondents on all interrogatories with the exception of interrogatory number 4 which related to whether Respondents knowingly, intentionally and deliberately discriminated based on race. In the margin beside that interrogatory, the jury wrote the words: "A need to hire more blacks & women for a balance to meet laws." The trial court returned the jury to further deliberate and resolve the inconsistency between its general verdict and its response to interrogatory number 4. [Pet.App.I - IV].

The jury, upon returning from its second deliberation, found in favor of Respondents in response to all questions on the verdict form. [Pet. App. I - IV]. The trial court gave Petitioner the opportunity to poll the jury and she declined. The trial court proceeded to discharge the jury without objection.

The trial court concurred with the jury and found for Respondents on Petitioner's Title VII claims. Judgment was accordingly entered for Respondents on October 26, 1988. [Pet. App. I - IV].

On November 4, 1988, Petitioner filed various post trial motions for judgment on her behalf notwithstanding the jury verdict and for judgment on her behalf regarding her Title VII claims.

The court found Petitioner's Title VII motion to be moot in view of its judgment for Respondent dated December 5, 1988 and overruled Petitioner's motion for judgment notwithstanding the verdict.

Petitioner subsequently appealed to the United States Court of Appeals for the Sixth Circuit. The Court of Ap-

peals affirmed the District Court's entry of judgment in favor of Respondents in accordance with the jury's general verdict in its decision of November 8, 1989. [Pet. App. I - IV].

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit's decision did not conflict with decisions from other federal courts of appeal; did not sanction a departure from the accepted usual course of judicial proceedings; and did not decide a federal question in conflict with applicable decisions of this Court.

Petitioner contends that the Court of Appeals' determination that the trial court properly cured an inconsistency between the jury's general verdict and its initial response to a special interrogatory conflicts with decisions with other circuits and decisions of this Court.

Rule 49(b) of the Federal Rules of Civil Procedure is applicable in cases such as this in which general verdicts are accompanied by interrogatories. The rule clearly states that "[w]hen the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial." A jury is therefore properly sent back for further consideration when its answers to special interrogatories are inconsistent with each other and one or more is inconsistent with the general verdict. *Blackwell* v. *Cities Service Oil Company*, 532 F.2d 1006 (5th Cir. 1976).

The Court of Appeals found that the District Court properly sent the jury back for further deliberation to eliminate the inconsistency. Such a finding is consistent with Rule 49(b) and the decision cited above from the Fifth Circuit.

While Petitioner contends that the decision below conflicts with other circuits' decisions, a close reading of those decisions cited by Petitioner reveals that they do not support such a contention. Petitioner cites *Elliott* v.

Watkins Trucking Company, 406 F2d 90 (7th Cir. 1969) for the proposition that when the jury finds facts that are inconsistent with the general verdict, then judgment should be entered based on the specially found facts. The court's decision in *Elliott* is not inconsistent with the Sixth Circuit's finding in this case. The court in *Elliott* was faced with a situation where it was impossible to reconcile the answer to the special interrogatory with the general verdict. In that case, there was a general verdict in favor of the plaintiff in a negligence action, but there was also a special finding of comparable negligence on the part of the defendant. Because this case took place in a jurisdiction where a finding of comparative negligence would totally bar recovery in a negligence action, the two findings were not reconcilable. There is no problem of irreconcilable findings in the current case. The final answers to each interrogatory were clearly consistent with the general verdict.

Petitioner cites *Aquachem Co. Inc.* v. *Olin Corp.,* 699 F.2d 516 (11th Cir. 1983) as controlling here because the trial court in that case found the jury's answer to a special interrogatory regarding damages to be controlling. Without reciting the myriad differences between the facts of *Aquachem* and those in the instant case, it is submitted that the import of the decision in *Aquachem* to this case is that a court may, within its discretion, amend a special verdict after it is rendered, to make it conform to the jury's obvious, but unexpressed intention. If the trial court here had followed *Aquachem,* it could have chosen to amend the initial answer to interrogatory number 4 to match the jury's obvious intent to find for Respondents on the issue of race discrimination. Instead, the trial court wisely decided to follow the options set forth in Federal Rule 49(b).

Petitioner also cites the Fifth Circuit's decision of *Phillips Chemical Company* v. *Hulbert,* 301 F.2d 747 (5th Cir.

1962) as being in conflict with the decisions below. That case recognizes that it is within the court's discretion whether to enter judgment on a special interrogatory, to order a new trial, or to return the jury for further deliberation when the answers to the interrogatories are consistent with one another. In the *Phillips* case there was an issue relating to missing critical jury instructions; no such issue is involved in this matter. Further, the answers to the interrogatories here were inconsistent with one another.

In *Schaafsma* v. *Morin Vermont Corp.*, 802 F.2d 629 (2nd Cir. 1986), the court simply stated the "plain error rule" in a case involving a problem with jury instructions. There was no "plain error" in this case and no issues have been raised alleging faulty jury instructions. Petitioner also attempts to cite in her favor two other cases, *Edwards* v. *Mayes*, 385 F.2d 369 (4th Cir. 1967) and *Miller* v. *Premier Corp.*, 608 F.2d 973 (4th Cir. 1979) wherein plain error was found due to defective jury instructions. None of these cases are remotely applicable to this matter.

In *Saunders* v. *Rhode Island*, 731 F.2d 81 (1st Cir. 1984) the case involved an error where the applicable law was unclear at the time the jury was instructed. That case also is simply not applicable to this matter. There were no problems with the jury instructions or the jury's understanding of the law. The only source of confusion for the jury, in this case, was the verdict form and interrogatory number 4, which as a result of missing instructions, asked the jury to assume discrimination had occurred.

None of the cases cited by Petitioner demonstrates that the decision in this case conflicts with any decisions from other circuits. Further, Petitioner cites no decision from this Court which conflicts with the decision below. Clearly there has been no demonstration that the Sixth Circuit sanctioned a departure from the usual course of judicial proceedings so as to call for this Court's intervention. The

Court of Appeals simply sanctioned that which is permitted by Federal Rule 49(b) and recognized by other circuits.

Petitioner attempts to frame the Court of Appeals decision as one which decides a federal question in a manner which is in conflict with decisions of this Court. Petitioner would have the Court believe that this case somehow relates to "reverse discrimination" in which she was discharged as a result of affirmative action for non-whites. This matter does not involve such a situation.

The issue here is whether the Court of Appeals correctly determined that the trial court acted properly in dealing with a conflict in the answers on the verdict form. This case is not one where a white person was discriminated against in order to favor non-whites. For that reason, the decisions which Petitioner cites regarding "reverse discrimination" are clearly not applicable to this case.

The jury in this matter made a marginal notation: "A need to hire more blacks & women for a balance to meet laws". To assign a specific meaning to this notation is speculative at best. There is nothing which indicates that the statement referred to Petitioner at all. The notation appears beside an interrogatory which, due to a clerical error, is phrased so as to assume discrimination took place. As a result, the notation could be simply an attempt to explain that which the jury was asked to assume. In any event, if the statement is to be construed at all, it must be construed as being consistent with the general verdict. *Gallick* v. *Baltimore and Ohio Railroad*, 372 U.S. 108 (1963).

The Court of Appeals further found that Petitioner had waived her objection to any perceived inconsistency by failing to enter an objection to the verdict form returned by the jury before the jury was discharged. If no timely objection is made relative to any alleged inconsistency of

its special finding and both parties acquiesce in the court's discharging of the jury, any objection to the general verdict on the grounds of an inconsistency with a special finding is waived. *Tennessee Consolidated Coal Company* v. *United Mine Workers of America*, 416 F.2d 1192 (6th Cir. 1969). See also, *Fernandez* v. *Chardon*, 681 F.2d 42 (1st Cir. 1982); *Walker* v. *Sinclair Refining Company*, 320 F.2d 302 (3rd Cir. 1963); *Stancill* v. *McKenzie Tank Lines*, Inc., 497 F.2d 529 (5th Cir. 1974); *Strauss* v. *Stratojac Corp.*, 810 F.2d 679 (7th Cir. 1987); and *Phillipine National Oil Company* v. *Garrett Corp.*, 724 F.2d 803 (9th Cir. 1984).

The Sixth Circuit obviously is not in conflict with the other circuits on this issue. Neither is it in conflict with any decisions of this Court. Further, Petitioner has failed to cite any authority to the contrary.

Petitioner raises for the first time in her petition that she did not waive her ability to object to any inconsistency in the verdict form due to the fact that the trial court did not show Petitioner's counsel the verdict form prior to discharging the jury. Petitioner's assertion is untenable. Her counsel was well aware of the handwritten notation prior to the jury's being sent back to deliberate a second time. When the trial court read aloud the answers to the general verdict and special interrogatories upon the jury's return, Petitioner's counsel had ample opportunity to determine whether the marginal statement had been removed. Further, Petitioner's counsel had the opportunity to poll the jury regarding its verdict. Also, Petitioner's counsel clearly had the opportunity to object to the discharge of the jury until he had had an opportunity to review the verdict form. As a result of said inaction, Petitioner has clearly waived her right to object at this time.

Further, it is this Court's general policy not to decide issues or questions not raised or litigated in the lower courts. *Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987).

II. The trial court did not disregard specific findings of the jury and substitute its own judgment regarding Title VII issues.

Petitioner claims that the trial court ignored "specific written jury findings" and substituted its own judgment with regard to the Title VII issues tried to the court. Petitioner cites the case of *Williamson* v. *Handy Button Machine Company*, 817 F.2d 1290 (7th Cir. 1987) for the proposition that jury findings are binding on the trial judge in cases where 42 U.S.C. § 1981 issues and Title VII issues are tried together.

The Court of Appeals did not specifically address this issue. Perhaps it is because the trial court did exactly what Petitioner claims the trial court should have done. The trial court followed the findings made by the jury in its answers to the interrogatories. For that reason, there was no error on the part of the trial court; nor was there error in the Court of Appeal's affirmation of that decision.

Presumably the "specific written jury findings of reverse discrimination" referenced by Petitioner is the unexplained marginal notation discussed above. Said notation is hardly a specific finding let alone one of "reverse discrimination." The jury marked "no" to interrogatory number 4 finding for Respondents. The jury clearly found for Respondents on all issues. The trial court's finding for respondent on Title VII issues obviously was consistent with the jury's findings. There is no "question" here to be settled by this Court as alleged by Petitioner.

CONCLUSION

Supreme Court Rule 10 requires that "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor." The reasons asserted by Petitioner fail to justify review by this Court. This Court has indicated that an issue must be more than just "academic" or "episodic". *Rice* v. *Sioux City Memorial Park Cemetary,* Inc., 349 U.S. 70 (1955). It is submitted that the facts of this case relating to the clerical error in the verdict form are unique and not likely to recur. Further, it is submitted that the trial court properly exercised its discretion with regard to the options provided in Federal Rule 49(b); and that the Sixth Circuit properly sanctioned the trial court's action. Moreover, Petitioner has waived any objection to any perceived inconsistency between the general verdict and responses to the interrogatories.

Accordingly, Respondents respectfully urge this Court to deny the petition for writ of certiorari to United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Douglas K. Browell, hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari was hand-delivered to the office of Robert D. Holmes, Counsel of Record for Petitioner, 16 East Broad Street, Columbus, Ohio 43215, on February 9, 1990. I further certify that all parties required to be served have been served.

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